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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1446

JOAN ROE, *et al.*,

Petitioners,

—v.—

JANE DOE,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *AMICUS CURIAE*

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Motion for Leave to File Brief As *Amicus Curiae*

The Authors League of America respectfully petitions for leave to file the annexed brief *amicus curiae*. The Authors League is a national society of professional writers and dramatists. One of its principal purposes is to express their views in cases involving rights of free speech and press. Although this appeal essentially involves a narrow issue, raised by a psychiatrist's disclosure of confidential information obtained from her patient, sweeping statements in the opinion below suggest radical new limitations on the First Amendment protection of authors and publishers in general from the restrictive effects of right-of-privacy suits and the threat of such litigation. With a deep concern that the decision of the narrow issue in this appeal should not produce such new restrictions on authors' freedom of expression, The Authors League respectfully applies for leave to file its brief *amicus curiae*.

Respectfully submitted,

IRWIN KARP
Attorney for The Authors League of America, Inc., as amicus curiae

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BRIEF OF THE AUTHORS LEAGUE OF AMERICA

Interest of The Authors League

The Authors League is a national society of professional writers and dramatists. Statements in the opinion below indicate that New York courts would impose new restrictions on the First Amendment protection of authors and publishers from the restrictive effects of right-of-privacy suits and the threat of such litigation. The Authors League is concerned that decision of the narrow issue on this appeal should not produce such new restrictions on authors' freedom of expression.

Summary of Argument

(i) The fundamental issues are whether petitioner-psychiatrist, in publishing her book, violated State regulations prohibiting doctors from disclosing confidential information obtained from their patients; and if so, what forms of relief can be granted.

(ii) Relief cannot be granted under the New York right-of-privacy statute when a plaintiff's name is not used in defendant's book.

(iii) Methods of selling a book cannot deprive an author of protection under the *Time, Inc.* First Amendment standards.

(iv) The First Amendment bars judicial creation of new causes of action for publication of non-defamatory statements.

POINT I

The Regulations of The Commissioner of Education.

Although it affirmed the Appellate Division's order without an opinion, the Court of Appeal's syllabus lays heavy stress on the plaintiff's argument that defendant-psychiatrist's book—containing details of plaintiff's life revealed during her treatment—violated Regulations of the Commissioner of Education (33 N.Y. 2d 902, 903). Under the Regulations, it is unprofessional conduct for a physician to reveal information relating to a patient, when it is obtained in a professional capacity. (Sec. 60.1 (d) [3])

The fundamental issues in this case are whether the petitioner-psychiatrist violated the Regulation when she

published the book; and if so, what forms of relief the court could grant. We respectfully submit that if the Regulation was violated, the First Amendment prohibits the granting of relief in the form of an injunction restraining publication. *Near* v. *Minnesota*, 283 U.S. 697; *Carroll* v. *Princess Anne*, 393 U.S. 175. The First Amendment's bar against injunctive relief is observed in libel suits. The Amendment must be equally protected here.

POINT II

The First Amendment Mandates the Test of "Identification by Name" in Right-of-Privacy Suits.

The Appellate Division did not confine its opinion to the Commissioner of Education's regulations. Even though the plaintiff's name was not used in the psychiatrist's book, the Court concluded that plaintiff also was entitled to relief under New York's right-of-privacy statute (Secs. 50, 51; N.Y. Civil Rights Law). Presumably this interpretation would apply not only to books by doctors disclosing information obtained from their patients, but to all books, plays and films written by authors who are not doctors, and do not obtain their information under the very unique and special doctor-patient relationship.

We submit that the Court's conclusion, which reverses prior interpretation of the statute, imposes a drastic restraint on freedom of expression and is prohibited by the First Amendment. In *Toscani* v. *Hersey*, 271 App. Div. 445, 448 (1946), the Appellate Division held that the privacy statute (Secs. 50, 51), does not grant relief to a person whose name or portrait is not used in the defend-

ant's book, film or play. The Court ruled that relief could not be granted plaintiff who, although not identified by use of his actual name, might be identified by details of description and narration. Applying this rule in a 1965 opinion, the same court denied recovery to the President of a University because a film, which allegedly identified him, "does not use his 'name, portrait or picture', the statutory test of identification (*Toscani* v. *Hersey* . . .)" *University of Notre Dame* v. *20th Century Fox*, 22 A D 2d 452.

We submit that the statutory test of "identification by name" is mandated by the First Amendment. To abandon the test could open the door to "a vast amount of litigation" (*Roberson* v. *Rochester Folding Box Co.*, 171 N.Y. 538, 545); and would certainly have a chilling effect on the First Amendment rights of authors, playwrights, publishers, and producers of plays and films.

Western society has survived the "roman à clef" for four centuries. From 17th century French novelists to Proust, Maugham, Huxley and Joyce, authors have intentionally portrayed real people in their works under fictitious names.* A recent study of Ernest Hemingway's first successful novel begins: "In the summer of 1965 I discovered that the Robert Cohen of THE SUN ALSO RISES lived less than a ten minute drive from my home." [Hemingway and *The Sun Set*", by Bertram D. Sarason; Microcard Editions, 1972]. Professor Sarason's book is a detailed study of the real persons who were well known to have appeared as fictitious characters in Hemingway's novel.

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* The New Encyclopedia Britannica: Micropaedia, vol. IX, p. 664; Macropaedia, vol. 13, p. 287 (1974). See also, "Literary Characters Drawn From Life", Earle Walbridge; H. H. Wilson Co., New York, 1936.

To abandon the statutory test of "identification by name" would not only destroy the "roman à clef"; it would also expose countless novelists and playwrights to suits under the statute when they borrowed experiences, traits and characteristics from different people to construct a fictional character. Yet the creation of novels, plays and films would be almost impossible if authors were thus foreclosed from drawing on such material from the real world.

But abandonment of the statutory test of "identification by name" would create the greatest restraint on freedom of expression when authors never intended to portray outraged plaintiffs in their novels, plays, or works of nonfiction. In a population of 203,000,000 Americans, there are bound to be some people whose experiences or characteristics may parallel, to some extent, those of characters or real persons in books, dramas or films. If the statutory test of "identification by name" is abolished, as the Appellate Division opinion suggests, any person claiming to be portrayed could sue for damages under the New York statute —even though he was not identified by name in the offending work, and even though the work did *not defame* him. To thus vastly expand a statute which was intended only to establish a limited right of action (see *Toscani* v. *Hersey*, 271 App. Div. at p. 447), would expose authors and publishers to all of the repressive and inhibiting factors which this Court described in *Time, Inc.* v. *Hill*, 385 U.S. 374, 389; it would encourage the proliferation of "strike" suits against authors, publishers, and producers of films and plays; and it would allow rich and powerful individuals to employ privacy suits as a weapon to suppress books that offend or displease them. (*Cf., Rosemont Enterprises, Inc.*

v. *Random House, Inc.*, 366 F. 2d 303, 311-313 [1966] and *Rosemont Enterprises, Inc.* v. *Random House, Inc. and John Keats*, 294 N.Y.S. 2d 122 [1968]).

POINT III

Advertising and Selling a Book for Profit Do Not Foreclose First Amendment Protection.

In its opinion, the Appellate Division obliquely (and erroneously) suggested that petitioners could not claim protection under this Court's First Amendment standards, set forth in *Time, Inc.* v. *Hill*, because of their "manner of advertising and selling the book." But as other Justices of the same Court correctly stated, films and "books . . . are a constitutionally protected form of expression notwithstanding that 'their production, distribution and exhibition is a large-scale business conducted for private profit' (*Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 501; *Jacobellis* v. *Ohio*, 378 U.S. 184, 187)." *University of Notre Dame* v. *20th Century Fox*, 22 A D 2d 452.

POINT IV

The First Amendment Prohibits Judicial Creation of New Actions for Publication of Non-Defamatory Statements.

In its opinion, the Appellate Division also seems to suggest that the "expanding recognition of invasion of privacy actions" permits courts to create a new class of privacy suits separate from those authorized by the New York statute (as limited by *Time, Inc.* v. *Hill*). We submit the

court erred. The opinions it cites deal with conduct having no relationship to the publishing of books, or production of films or plays. They offer no support for the court's theory that judges can impose such new restraints on freedom of speech and press.

In *Time, Inc.* v. *Hill*, Justice Black (dissenting) warned that if judges "by their own fiat" can create "a right of privacy superior to the right of free press that the Constitution created" then they can create other privileges "that balance away other cherished Bill of Rights freedoms." (at p. 400) Attempts by New York courts to expand the reach of its "privacy" statute demonstrate the soundness of his warning. In 1902, the New York Court of Appeals—with more faith in the First Amendment than its successors have demonstrated—rejected the claim that courts could create a right of privacy. *Roberson* v. *Rochester Folding Box Co.*, 171 N.Y. 538, 544-5). The Court said that if the Legislature wished to prevent the use of a person's name or portrait in advertising, it could enact a law establishing a limited right, confined to that purpose. This, and this alone, the Legislature did. *Rhodes* v. *Sperry & Hutchinson Co.*, 193 N.Y. 225.

However, New York courts have stretched the statute far beyond that limited purpose. In *Time Inc.* v. *Hill*, a majority of this Court limited, but sanctioned to some extent, that process of judicial legislation. We believe the opinion curtailed First Amendment rights. And we earnestly urge that this Court should not permit any further incursions on those rights. The potential for restraint in this area is much greater than in the area of libel, where there are some guidelines for determining that certain types of state-

ments are defamatory. But almost any *non-defamatory* statement, later held to be false or intrusive on a person's "private life", could at the least subject an author and his publisher to the costs and burdens of defending a "privacy" suit—if courts are permitted to create new rights of action. Authors and publishers would have no meaningful notice, no less "fair notice", of what types of speech are restricted. Such vagueness and ambiguity violate their First Amendment rights. *Winters* v. *New York*, 333 U.S. 507.

CONCLUSION

It is respectfully submitted that the order appealed from should be reversed.

Respectfully submitted.

IRWIN KARP
Attorney for The Authors League of America, Inc., as amicus curiae.